

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

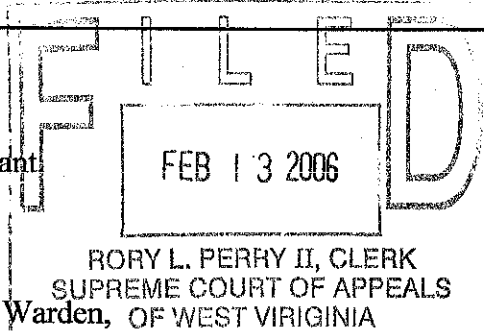
FREDERICO HATCHER,

Appellant,

vs.

THOMAS MCBRIDE, Acting Warden,  
Mount Olive Correctional Complex,

Appellee.



No. 32977

Appeal from the Circuit Court of Cabell County  
Hon. Dan O'Hanlon, Judge  
Case Number 98-C-1016  
based upon Cabell County Criminal Case Number 96-F-88

APPELLANT'S BRIEF

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TREATISES:

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## MEMORANDUM OF LAW

### JURISDICTION

This Court has jurisdiction to issue a writ of habeas corpus pursuant to W. Va. Code Section 53-4A-1. See also Rule 3 of the West Virginia Rules of Appellate Procedure.

### STANDARD OF REVIEW

The standard of review is explained in the following passage from Mugnano v. Painter, 212 W. Va. 831, 833, 575 S.E.2d 590, 592 (2002).

In Syllabus Point 1 of *State ex rel. Postelwaite v. Bechtold*, 158 W. Va. 479, 212 S.E.2d 69 (1975), *cert. denied*, 424 U.S. 909, 96 S. Ct. 1103, 47 L. Ed. 2d 312 (1976), this Court held that: "Findings of fact made by a trial court in a post-conviction habeas corpus proceeding will not be set aside or reversed on appeal by this Court unless such findings are clearly wrong." The Court has also indicated that a circuit court's final order and ultimate disposition are reviewed under the abuse of discretion standard and that conclusions of law are reviewed *de novo*. *State ex rel. Hechler v. Christian Action Network*, 201 W. Va. 71, 491 S.E.2d 618 (1997).

Id.

### QUESTION PRESENTED

Should the Court grant Mr. Hatcher relief when Mr. Hatcher's sentencing was unfairly prejudiced by highly prejudicial and opinionated statements made by a Circuit Judge?

### BRIEF ANSWER

Yes. The Court should grant relief to Mr. Hatcher. The Circuit Judge's lengthy testimony in front of the jury at Mr. Hatcher's sentencing hearing was clearly prejudicial and violates Mr. Hatcher's state and federal constitutional rights, the Professional Code of Conduct's Judicial Cannons, and the case law. Moreover, Mr. Hatcher's entire case is fraught with injustices and violations of his United States and West Virginia Constitutional rights.

## STATEMENT OF THE CASE

On October 22, 1995, Mark Vernatt, died after being shot three times with a .457 Magnum revolver while he was working as an employee of the Convenient Food Mart in Huntington, West Virginia. Ultimately, three individuals, Frederico Hatcher, Shawn Tabor, and Mike Walker were arrested for the murder of Mark Vernatt.

Mark Vernatt's murder was a case that the media followed avidly. Ultimately, the media coverage made it impossible for Frederico Hatcher to have a fair trial in the Sixth Circuit of the State of West Virginia. See Pre-trial Hearing, 4/2/1996, pp. 23-24.

At the time of the murder trial, Mr. Hatcher had completed tenth grade primarily by attending "LD and BD" classes. See Habeas Hearing Transcript, 05/23/2005, p. 74. Mr. Hatcher had been going to Pretera Mental Health Center for treatment from the time he was six (6) years-old until he turned eighteen (18) years-old. Id. at 75. During his pre-trial incarceration and trial, Mr. Hatcher was using drugs. Id. at 85-86.

The State ended up having a bifurcated murder trial with Frederico Hatcher as the defendant. At Frederico Hatcher's trial, both Shawn Tabor and Mike Walker testified against Frederico Hatcher basically testifying that Frederico Hatcher killed Mark Vernatt by firing the first two of three shots during a robbery of beer from the convenience store. See Trial Transcript, pp. 288-299, 340-341

Interestingly, they had given earlier conflicting statements. Indeed, Shawn Tabor's first statement put the entire blame for the murder of Mark Vernatt on Mike Walker, not Frederico Hatcher. Shawn Tabor's first statement is quoted in the following passage.

Question: Nobody said anything?

Answer: I heard a gunshot and the guy moan, and I went to turn around to take off and I had the beer in my hand and then it was, they shot twice, two more times.

Question: Who did?

Answer: Mike.

Question: Did you see Mike actually shoot the gun?

Answer: He shot once, I saw him shoot one round. I didn't see him shoot the first two.

Question: Was *[sic]* there three bullets all he had then?

Answer: Yes.

Question: Where was Fred standing when Mike did all of this?

Answer: Right there at the door.

Statement of Shawn Tabor, 10/24/1995.

Mike Walker testified that he fired the final shot, because Frederico Hatcher told him to do it, and he is afraid of Frederico Hatcher. Mike Walker testified that he is afraid of Frederico Hatcher, because Frederico Hatcher threatened to harm either Mike Walker or Mike Walker's sister, Kim Walker. See Trial Transcript, pp. 289-290.<sup>1</sup>

After the jury returned a verdict of felony murder, the State presented its evidence on the issue of mercy. In an unprecedented move, the State called Judge Alfred E. Ferguson to testify about his opinion of Frederico Hatcher during the second phase of the trial. The State did not list

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<sup>1</sup>Despite his fear of Frederico Hatcher, Mike Walker ended up requesting to be Frederico Hatcher's cellmate at Mount Olive Correctional Center after the murder trial. Indeed, Mike Walker and Frederico Hatcher were cellmates together living in an efficiency cell as roommates for around two (2) years until Mike Walker was subsequently transferred to Huttonsville Correctional Center. See Habeas Hearing Transcript, 05/23/2005, pp. 76-84.

Judge Ferguson as a witness until it filed a praecipe for witnesses a little more than three (3) hours before the mercy phase.

Not only did Judge Ferguson testify as to his opinion of Frederico Hatcher, but also, Judge Ferguson testified about the contents and nature of Frederico Hatcher's juvenile petitions. See Transcripts, pp. 28-38. Specifically, Judge Ferguson testified about the contents and nature of Mr. Hatcher's dismissed and adjudicated juvenile petitions. Id. Part of Judge Ferguson's testimony is in the following passage.

Q: Did you feel like there was any hope of rehabilitation?

A: I knew, I knew, I've dealt with thousands of adult criminals also. I knew Frederico was going to be in trouble with the law. I was not surprised when I saw that he was arrested on this charge, and my statements were, when he was arrested, that it was probably him that did the shooting, to be truthful.

\* \* \* \* \*

Q: ...[D]o you feel that there is a, from what you know of him in the past, do you feel that there is a risk of him committing violence to the persons of others?

A: Well, certainly. Absolutely, unless he totally changes his past conduct. He's not going to get any better in prison. We don't send people to prison to rehabilitate them, we send them there to punish them and to remove them from society, and there's some people that need to be removed from society. Nobody likes to do, but we have to do it. Yes I'm sorry, to say that also.

Sentencing Transcript, pp. 27-39. Throughout his testimony, Judge Ferguson was repeatedly referred to as "Judge" by the prosecuting attorney.

### PROCEDURAL HISTORY

A jury convicted Mr. Hatcher of first degree murder on June 27, 1996. Through a bifurcated proceeding, Mr. Hatcher received a sentence of life "without mercy." On August 13, 1996, the Court sentenced Mr. Hatcher to life without mercy for first degree murder and a consecutive sentence of two-hundred-and-twelve (212) years for an unrelated aggravated robbery conviction for theft of a pizza. Mr. Hatcher filed appeals for both the first degree murder conviction and the aggravated robbery charge<sup>2</sup>, and the West Virginia Supreme Court of Appeals refused both appeals.

Mr. Hatcher filed a habeas petition for the first degree murder charge on December 22, 1998. On May 23, 2005, the Circuit Court of Cabell County held a habeas hearing based upon Mr. Hatcher's twice-amended petition. On May 27, 2005, the Court entered an order denying Mr. Hatcher's petition for writ of habeas corpus. Therefore, Mr. Hatcher filed a notice of intent to appeal on June 6, 2005 and filed an appeal with this Court in August 2005.

This case is now in its eighth (8<sup>th</sup>) calendar year, and ten (10) calendar years have passed since the underlying trial. On January 24, 2006, the Court heard the oral presentation on the motion docket. Subsequently, the Court granted the writ of habeas corpus for appeal as to assignment of error number one (1) in an order dated January 26, 2006.

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<sup>2</sup>Mr. Hatcher's habeas petition for the aggravated robbery charge has already been fully adjudicated ending with a final disposition of a refusal for appeal entered by the West Virginia Supreme Court of Appeals on or about October 6, 1999 in case number 992681.

### ASSIGNMENT OF ERROR

Mr. Hatcher's sentencing was unfairly prejudiced by highly prejudicial statements made by a Circuit Judge.

1. The Circuit Judge's testimony violated the Code of Professional Conduct and the Judicial Cannons.
  - a. Judges should not testify as character witnesses.
  - b. The Judge's testimony created an actual conflict and an appearance of a conflict.
  - c. The Circuit Judge testified in an area where he had no expertise.
2. The Circuit Judge's testimony created a problem of future dangerousness when the Circuit Judge testified in an area where he had no expertise and when the Circuit Judge revealed his mental thought processes for forming opinions in cases involving Mr. Hatcher.
3. Other jurisdictions, both federal and state, have ruled that testimony from a judge is prejudicial.

## ARGUMENT

**Mr. Hatcher's sentencing was unfairly prejudiced by highly prejudicial statements made by a Circuit Judge.**

"Government is instituted for the common benefit, protection and security of the people, nation or community. Of all its various forms that is the best, which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration; and when any government shall be found inadequate or contrary to these purposes, a majority of the community has an indubitable, inalienable, and infeasible right to reform, alter or abolish it in such manner as shall be judged most conducive to the public weal."

W. Va. Const. Art. III.

At Mr. Hatcher's bifurcated sentencing hearing, in an extremely unusual occurrence, Circuit Judge Alfred Ferguson testified about Mr. Hatcher. A little more than three hours before the bifurcated sentencing hearing, Prosecutor Chiles filed a Praecipe for Witnesses listing Judge Ferguson as a witness. Clearly, Judge Ferguson's testimony, especially his testimony of Mr. Hatcher's juvenile records, was not pertinent to the jury's task. Even if the Court would find that Judge Ferguson's testimony was pertinent to the task, Judge Ferguson was certainly not the only possible source of this information. Moreover, Judge Ferguson testified about his *opinion* of Mr. Hatcher.

Without a cautionary instruction and over the objections of Mr. Hatcher's counsel, the Court allowed testimony about Mr. Hatcher's sixteen (16) juvenile files (twelve (12) of which were dismissed) (Sentencing Transcript p. 28) on Mr. Hatcher since he was ten (10) years-old

(Sentencing Transcript, 27-41). Specifically, Judge Ferguson testified about Mr. Hatcher's prior adjudicated juvenile delinquencies, Mr. Hatcher's prior juvenile charges which were subsequently dismissed, and Mr. Hatcher's dealings with Judge Ferguson since 1980.

Sentencing Transcript, pp. 27-39. Judge Ferguson gave the following impression of Mr. Hatcher during the hearing, "Frederico, my impression of him is anything you say to him just goes right through him. He's a kid that never shows any emotion. It's like me trying to talk to that wall to try to tell him something." See Sentencing Transcript, p. 39. Moreover, over the objections of Mr. Hatcher's counsel, Judge Ferguson offered the following testimony.

Q: Did you feel like there was any hope of rehabilitation?

A: I knew, I knew, I've dealt with thousands of adult criminals also. I knew Frederico was going to be in trouble with the law. I was not surprised when I saw that he was arrested on this charge, and my statements were, when he was arrested, that it was probably him that did the shooting, to be truthful.

\* \* \* \* \*

Q: ...[D]o you feel that there is a, from what you know of him in the past, do you feel that there is a risk of him committing violence to the persons of others?

A: Well, certainly. Absolutely, unless he totally changes his past conduct. He's not going to get any better in prison. We don't send people to prison to rehabilitate them, we send them there to punish them and to remove them from society, and there's some people that need to be removed from society. Nobody likes to do, but we have to do it. Yes I'm sorry, to say that also.

Sentencing Transcript, pp. 27-39.

Even Mr. Hatcher's trial lawyers have testified that Judge Ferguson was expressing his opinion of Mr. Hatcher. First, Mr. Spurlock, a trial lawyer for more than thirty (30) years<sup>3</sup>, testified that Judge Ferguson testified to his opinion of Mr. Hatcher. See Habeas Hearing Transcript, 05/23/2005, p. 15. Second, when Mr. Oliverio was asked whether Judge Ferguson was expressing his opinion about Mr. Hatcher, Mr. Oliverio responded, "It certainly sounds like it."

**1. The Circuit Judge's testimony violated the Code of Professional Conduct and Judicial Cannons.**

Judge Ferguson's testimony regarding Mr. Hatcher's character was very damaging to his case. First, Judge Ferguson was giving testimony in an area where he has no expertise. Therefore, this testimony presents the problem of future dangerousness. Second, according to Canons One (1), Two (2), and Three (3) of the Code of Judicial Conduct, judges should not testify as character witnesses.<sup>4</sup> Third, Judge Ferguson, who has at times served as the Chief Circuit Judge, has the most seniority out of the circuit judges in this county. His seniority creates an actual conflict and an appearance of a conflict when he testifies at a sentencing hearing that is presided by a less tenured judge.

**a. Judges should not testify as character witnesses.**

A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

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<sup>3</sup>See Habeas Hearing Transcript, 05/23/2005, p. 32.

<sup>4</sup>That is, a judge should not testify as a character witness for good character or bad character.

A. A judge shall respect and comply with the law, shall avoid impropriety and the appearance of impropriety in all of the judge's activities, and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

West Virginia Professional Conduct, Cannon 2 A.

A Circuit Judge who has been on the bench for over twenty (20) years, who testifies that some people cannot be rehabilitated and that he knew Mr. Hatcher was the murderer<sup>5</sup> does not show impartiality. When a Circuit Judge makes such statements he/she is testifying about character and showing partialness and giving personal opinions. A Circuit Judge who testifies about his rulings in prior cases<sup>6</sup> shows his mental process in making decisions.

The errors in this case are clearly wrong, and the Court clearly abused its discretion. Therefore, Mr. Hatcher respectfully requests that this honorable Court grant him relief.

**b. The Circuit Judge's testimony created an actual conflict and an appearance of a conflict.**

Judge Ferguson, who has at times served as the Chief Circuit Judge, has the most seniority out of the circuit judges in this county. His seniority creates an actual conflict and an appearance of a conflict when he testifies at a sentencing hearing that is presided by a less tenured judge, such as the trial judge, Judge Egnor. Throughout his testimony, Judge Ferguson was referred to as "Judge" by the prosecuting attorney.

The errors in this case are clearly wrong, and the Court clearly abused its discretion. Therefore, Mr. Hatcher respectfully requests that this honorable Court grant him relief.

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<sup>5</sup>See Sentencing Transcript, pp. 27-39

<sup>6</sup>See Sentencing Transcript, pp. 27-39

**c. The Circuit Judge testified in an area where he had no expertise.**

In the case at hand, Circuit Judge Egnor allowed the State to have Circuit Judge Ferguson testify without a cautionary instruction. As Justice Cleckley has opined, a Circuit Judge testifies as a normal person not as an expert witness.<sup>7</sup> 1-6 *Handbook on Evidence for West Virginia Lawyers* § 6-5 (2005).

It should be noted that Rule 605 is limited only to trials in which the judge is presiding. A witness is not disqualified merely because s/he is an active judicial officer. Judges should be called as witnesses with caution, but the court concluded that judges are not *per se* disqualified. In cases where a judge is called, it would be appropriate to give a cautionary instruction advising the jury that a judge's testimony is not entitled to greater weight merely because s/he is a judge.

Id.

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<sup>7</sup>Part of Judge Ferguson's testimony that would make a jury think that he is testifying as to his opinion and also his "expertise" is in the following passage.

Q: Did you feel like there was any hope of rehabilitation?

A: I knew, I knew, I've dealt with thousands of adult criminals also. I knew Frederico was going to be in trouble with the law. I was not surprised when I saw that he was arrested on this charge, and my statements were, when he was arrested, that it was probably him that did the shooting, to be truthful.

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Q: ...[D]o you feel that there is a, from what you know of him in the past, do you feel that there is a risk of him committing violence to the persons of others?

A: Well, certainly. Absolutely, unless he totally changes his past conduct. He's not going to get any better in prison. We don't send people to prison to rehabilitate them, we send them there to punish them and to remove them from society, and there's some people that need to be removed from society. Nobody likes to do, but we have to do it. Yes I'm sorry, to say that also.

Sentencing Transcript, pp. 27-39.

In the case at hand, the jury could have easily determined that Judge Ferguson testified as an expert witness. First, the jury most likely considered Judge Ferguson's experience as a judge. Indeed, throughout his testimony, Judge Ferguson was referred to as "Judge" by the prosecuting attorney. Second, the jury most likely considered the fact that Judge Ferguson had, at that time, been a judge for over twenty (20) years, often serving as Chief Judge over the trial judge, Judge Egnor. Third, the trial court gave no cautionary instruction regarding Judge Ferguson's testimony.

The errors in this case are clearly wrong, and the Court clearly abused its discretion. Therefore, Mr. Hatcher respectfully requests that this honorable Court grant him relief.

2. **The Circuit Judge's testimony created a problem of future dangerousness when the Circuit Judge testified in an area where he had no expertise and when the Circuit Judge revealed his mental thought processes for forming opinions in cases involving Mr. Hatcher.**

If this Court will to allow Judge Ferguson's testimony, then future judges could be compelled to testify to character and even mental thought process. For example, in the case at hand, the Circuit Judge testified directly to his mental processes in forming his opinions of Mr. Hatcher and also in his approximately twenty (20) prior rulings on Mr. Hatcher's sealed juvenile cases. (The Court actually dismissed approximately sixteen (16) of Mr. Hatcher's juvenile cases.)

The Court has already addressed this issue in a similar case. In State ex rel Kaufman, the Court ruled the following. See State ex rel. Kaufman v. Zakaib et al, 207 W. Va. 662, 535 S.E.2d 727 (2000). "Judicial officers may not be compelled to testify concerning their mental

processes employed in formulating official judgments or the reasons that motivated them in their official acts.” Id. at Syl. Pt. 3.

In fact, other states have cited Kaufman, further holding that the scope of judicial privilege is absolute. The following passage from a recent Illinois case discusses Kaufman.

In the case of State ex rel. Kaufman v. Zakaib, 207 W. Va. 662, 535 S.E.2d 727 (W. Va. 2000) (Kaufman), the West Virginia Supreme Court held that judicial officers may not be compelled to testify regarding their mental processes used in formulating official judgments or the reasons that motivate them in their official acts. Kaufman, 535 S.E.2d at 735. Although the Kauffman Court did not speak in terms of an absolute or qualified privilege, it noted that the scope of the privilege is limited to communications relating to a judge carrying out his or her official duties. Kaufman, 535 S.E.2d at 735 ("The Court is mindful that this protection from discovery proceedings has its limits, and those limits are that a judge must be acting as a judge, and that it is information regarding his or her role as a judge that is sought"). By addressing the scope of the privilege as opposed to balancing the need for disclosure of the information against the degree of intrusion upon the court's right to confidentiality, we believe that the Kaufman Court was analyzing a privilege it considered to be absolute in nature.

Thomas v. Page, et al., 361 Ill. App. 3d 484, 493-494; 837 N.E.2d 483, 492-493 (2005).

The errors in this case are clearly wrong, and the Court clearly abused its discretion. Therefore, Mr. Hatcher respectfully requests that this honorable Court grant him relief.

**3. Other jurisdictions, both federal and state, have ruled that testimony from a judge is prejudicial.**

The adjudication of the issue of a judge testifying is limited. However, several cases appear to follow the Frankenthal test. See. U.S. v. Frankenthal, 582 F.2d 1102 (7<sup>th</sup> Cir. 1978). Recently, the Circuit used the Frankenthal test in Roth. This test is described in the following passage.

"As set forth above, Judge Rosenwasser may not be compelled to testify regarding his mental processes; however, there are limited circumstances where a judge's factual testimony is so essential that the general prohibition against judicial testimony may be compromised. The Seventh Circuit has developed an analysis to be applied when determining whether such "limited circumstances" exist. In United States v. Frankenthal, 582 F.2d 1102 (7<sup>th</sup> Cir. 1978), the Seventh Circuit allowed the introduction of judicial testimony because the judge "possessed factual knowledge that was highly pertinent to the jury's task, and he was the only possible source of testimony on that knowledge." *Id.* at 1108. However, in reaching its decision, the Frankenthal Court cautioned that "calling a judge to give testimony in any proceeding is a very delicate matter." *Id.* at 1107. In fact, the judge's testimony was only permitted because the judge was only required to give "brief, strictly factual testimony." *Id.* at 1108 (emphasis added).

This Court recognizes that Frankenthal is a Seventh Circuit decision; however, the logic of Frankenthal is persuasive and in the absence of any controlling Second Circuit precedent, this Court chooses to adopt that court's reasoning. Accordingly, this Court finds that a judge may only be required to testify if he (1) possesses factual knowledge,

(2) that knowledge is highly pertinent to the jury's task, and (3) is the only possible source of testimony on the relevant factual information.

In order for judicial testimony to be required, the testimony must relate to the judge's factual knowledge--not his mental processes. With respect to the case at bar, there is no question that Judge Rosenwasser has factual knowledge regarding the Antonio Bryant case; however, the two questions that must be resolved are (a) whether that knowledge is highly pertinent to the jury's task in this case and (b) whether Judge Rosenwasser is the only possible source of testimony on that knowledge. This Court finds (1) that Judge Rosenwasser's testimony is not highly pertinent to the jury's task in this case and (2) that there are two other possible sources for the factual information that Judge Rosenwasser is being asked to testify about."

U.S. v. Roth, 332 F. Supp 2d 565, 568 (2d. Cir. 2004).

The United States Supreme Court has cautioned against judges testifying. In the following passage, the Court discusses that adverse testimony from a judge can take away a defendant's right to testify. "It is important that hostile comment of the judge should not render vain the privilege of the accused to testify in his own behalf. *Hicks v. United States*, 150 U.S. 442, 452; *Allison v. United States*, 160 U.S. 203, 207, 209, 210." Quercia v. U.S., 289 U.S. 466, 470, 53 S. Ct. 698, 699, 77 L. Ed. 1321, 1325 (1993).

The errors in this case are clearly wrong, and the Court clearly abused its discretion. Therefore, Mr. Hatcher respectfully requests that this honorable Court grant him relief.

### CONCLUSION

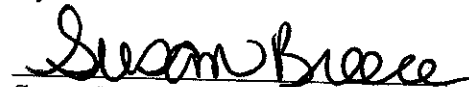
For all the foregoing reasons, Mr. Hatcher requests relief from this Court. The errors in this case are clearly wrong, and the Court clearly abused its discretion. Therefore, Mr. Hatcher respectfully requests that this honorable Court grant him relief.

Wherefore, your Appellant, respectfully requests the following relief:

1. A hearing;
2. That the Court reverse the Appellant's conviction for the charges in this petition;
3. That the Court expunge the Appellant's criminal record to show no conviction and no arrest for the charges in this petition;
4. That the Court release the Appellant from his confinement, or in the alternative, set a bond;
5. That the Court grant any further relief that it deems necessary.

RESPECTFULLY SUBMITTED,  
FREDERICO HATCHER  
APPELLANT

By Counsel:



Susan Breece / WV Bar #7963

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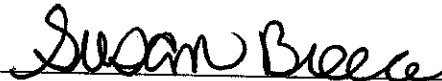
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CERTIFICATE OF SERVICE

I, Susan Breece, counsel for the Appellant Fred Hatcher, do hereby certify that I served a true and accurate copy of the foregoing Appellant's Brief upon Prosecutor Chris Chiles, Cabell County Courthouse, 750 Fifth Avenue, Huntington, WV 25701, and Darrell McGraw, Attorney General, State Capitol Complex, Building 1, Room E-26, Charleston, WV 25305, by depositing the same into the USPS first class mail and mailing it to the Prosecutor, Cabell County Courthouse, 750 Fifth Avenue, Huntington, WV 25701 and the Attorney General, State Capitol Complex, Building 1, Room E-26, 1900 Kanawha Blvd. E., Charleston, WV 25305 on this 13<sup>th</sup> day of February in the year 2006.



Susan Breece/WV Bar #7963